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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1415

HERMAN ROSS,
Petitioner,

vs.

WILLIAM R. TAIT, Mason Contractor,
Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI

William R. Tait, Respondent, prays that the Petition for Writ of Certiorari to the Supreme Court of Michigan be denied.

QUESTION PRESENTED FOR REVIEW

Was the Defendant denied a fair trial by the comments of the Trial Judge as to the testimony of the Defendant and his witnesses and Defendant's theory of the case?

COUNTER-STATEMENT OF THE CASE

On or about July 19, 1965, Respondent, William R. Tait, was hired by Petitioner, Herman Ross, to perform the masonry work on an apartment project of the Petitioner's, which consisted of approximately forty (40) townhouse buildings and a pool house. Upon conclusion of the project, a dispute arose as to money allegedly due the Respondent, including certain "extras" which were performed over and above the original contract. The Petitioner, in turn, claimed certain offsets by way of "back-charges" or claims for damage done by Respondent and/or his men.

Respondent thereupon commenced suit against Petitioner for Fourteen Thousand Three Hundred Fifty-Five and 86/100 ($14,355.86) Dollars; and Petitioner filed a Counterclaim against th Respondent, claiming that he overpaid the Respondent and was entitled to additional monies on the back-charges, which Counter-claim totaled Twelve Thousand Seventy-Three and 07/100 ($12,073.07) Dollars. The case was brought on for trial before the Honorable Neal Fitzgerald, Circuit Judge for the County of Wayne, sitting without a jury. After five (5) days of trial, the trial judge found for Respondent for a portion of his claim, in the amount of Nine Thousand Five Hundred Seventy-Four and 65/100 ($9,574.65) Dollars, and for the Petitioner for a portion of his backcharges in the amount of Eight Hundred Twenty-Seven and 65/100 ($827.65) Dollars, which resulted in a net Judgment in favor of the Respondent in the amount of Eight Thousand Seven Hundred Forty-Seven and no/100 ($8,747.00) Dollars.

The Petitioner, in his brief, has assumed that the trial judge was constantly argumentative and hostile toward the

Petitioner and his witnesses. Nothing could be further from the truth. The fact that the trial lasted five (5) days and caused almost six hundred (600) pages of transcript is mute testimony to the fact that each party was given full opportunity to present its case.

Further evidence of this fact is brought out by the verdict, wherein Respondent did not fully prevail and, in fact, certain of the Petitioner's cross-claims were allowed. Certainly if the trial judge were as unfair and partial as Petitioner would seem to indicate, he would not have allowed any of Petitioner's counter-claims nor disallowed portions of Respondent's claims.

A reading of the transcript will show that the attitude of Petitioner and his witnesses was one of beligerence and a very loose regard for the truth.

The transcript pointed out the fact that Herman Ross testified one way in his deposition and another way at the time of trial (Transcript p. 265-269). His witness, Mr. Winter, admitted signing an affidavit which was not true, (Transcript p. 391-392) and Wallace Ross, brother of Petitioner, in a vain attempt to assist his brother's cause, testified that he saw and did things which would place him all over the project at the same time. (Transcript p. 442-479).

The comments of the trial judge were made as a reaction to the incredible testimony of the Petitioner and his witnesses. However, the Petitioner was given a full opportunity to present his case, and the fact that the trial judge did not believe the Petitioner or his witnesses is not grounds for reversal, and his reasons therefor are amply supported by the record.

The Petitioner has raised the same question presented here before the Michigan Court of Appeals and the Su-

preme Court of Michigan. The Michigan Court of Appeals affirmed the trial court stating that the record clearly supported the findings of the trial judge, and further, that the record did not indicate that the Petitioner was denied a fair and impartial trial.

The Supreme Court of Michigan, after a review of the record and briefs submitted, refused to grant leave to appeal, thus affirming the decision of the Michigan Court of Appeals.

REASONS FOR DENYING THE WRIT

This case presents no new or novel question which would affect the jurisprudence of this country since the principles governing the conduct of judges sitting without juries has been settled for many years. The only question that arises from time to time is the application of these principles to the facts within a particular case.

The trial judge has the right and the duty, within reasonable limits, to bring out facts in the case before him clearly, so that impartial function of his office may be fairly and justly performed. *Gantner* v *Gantner*, (1952) 246 P 2d 923, 39 Cal. 2d 272; *In re Estate of DuPont*, (1943) 140 P 2d 866, 60 Cal. App 2d 276.

It is not improper, as prejudicing the case, for the judge to announce during the progress of the trial, the essential legal principles involved, or to express his opinion on the merits of the litigation. *Morel* v *Simonian*, (1930) 284 P 694, 103 Cal. App 490. In *Irer* v *Gawn*, (1929) 277 P 1053 99 Cal. App 17, it was held that severe criticism of Plaintiff's testimony as a witness in his own behalf as being unsatisfactory cannot be held misconduct where the judge allowed part of Plaintiff's claim. Nor can it be said that

a judge failed to grant a fair and impartial trial where a party is admonished to be more responsive to the questions put to him and by rejecting the testimony of a witness whose testimony was such as to amply justify the rejection. *In Re Sharff's Estate* (1963) 33 Cal. Reporter 52, 219 CA 2d 128.

The fact that the judge exercised his right to comment on the evidence and to indicate disbelief of certain witnesses does not establish that he prejudged the case. *Boomer* v *Abbett* (1957) 154 CA 2d 218, 315 P 2d 924.

The above cited cases are illustrative of the law today and allow great latitude on the part of the trial judge in conducting a trial without a jury. This case was rather complicated and confusing because of the various claims and counter-claims involved. By its very nature, questioning in the case was necessitated by the trial judge in order to gain a greater understanding of the facts involved. There is no question that counsel for both parties were given ample time and opportunity to present all the witnesses and testimony that they desired to prove their respective positions.

The Michigan Court of Appeals cited the case of *Houghton* v *Collins*, (1955) 344 Mich. 175, 73 NW2d 208, which has upheld the general principles as above stated, and upon its review of the entire record, it could not find a basis to show that Petitioner was denied a fair trial. The fact that the case at bar is not reviewable *de novo* does not change the principle involved, since in either instance, it is the trial judge sitting as a trier of fact.

Houghton represents the general law today in Michigan and, generally, throughout the country, and its principle should remain intact.

In addition, the Michigan Court of Appeals found that there was ample evidence to support the judgment of the trial judge, independently, of the question of the conduct of the trial judge.

The fact that Respondent did not fully prevail, and that certain of the Petitioner's counter-claims were allowed is conclusive of the fact that the trial judge did not prejudge the case, and that Petitioner was granted a full and impartial trial.

CONCLUSION

The Respondent herein believes that the principles involved in this case have been well settled in this country, and that those principles have been correctly applied by the appellate courts of Michigan to this case.

Accordingly, it is respectfully requested that the Petition for Writ of Certiorari be denied with costs assessed.

Respectfully submitted,

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